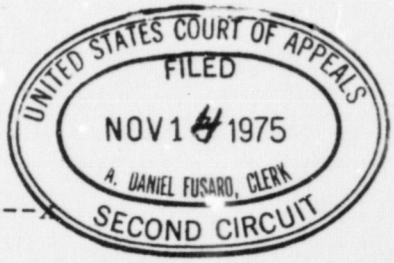
United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7388

To be argued by
MURRAY A. GORDON, ESQ.



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BERALDINE L. ACHA and ARLENE M. EGAN, each individually and on behalf of all others similarly situated,

Appellants,

-against-

75 - 7388

ABRAHAM D. BEAME, individually and in his capacity as Mayor of the City of New York, MICHAEL J. CODD, individually and in his capacity as Police Commissioner of the New York City Police Department and THE CITY OF NEW YORK, as a public employer,

Appellees.

APPELLANTS' REPLY BRIEF

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Appellees,

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APPELLANTS' REPLY BRIEF

By order of this Court dated October 1, 1975, appellants are authorized to file a reply brief on or before November 14, 1975. This brief constitutes the reply of appellants.

I.

APPELLEES' BRIEF FAILS TO ADDRESS ITSELF TO THE PRINCIPAL PROPOSITION URGED BY APPELLANTS THAT §80, CIVIL SERVICE LAW, AS APPLIED HEREIN, VIOLATES TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 IN THAT IT PERPETUATES PAST UNLAWFUL DISCRIMINATORY HIRING PRACTICES AGAINST IDENTIFIABLE VICTIMS OF SUCH PRIOR PRACTICES.

The major thrust of appellants' Title VII argument is that the application of §80 in the circumstances of this case to appellants and those similarily situated perpetuates not only prior discriminatory practices, but prior discriminatory practices based upon sex[1] where were unlawful at the time they occurred. Appellees have not responded to this argument. Instead, they cite three cases [Waters v. Wisconsin Steel Works of Int. Harvester Co., 502 F.2d 1309 (7th Cir. 1974), cert. filed 43 U.S.L.W. 3476 (February 24, 1975); Jersey Central Power and Light Co. v. Local Unions 327 etc. of I.B.E.W., 508 F.2d 687 (3rd Cir. 1975); and Watkins v. United Steel Workers of America Local No. 2369, 516 F.2d 41 (5th Cir. 1975)] for the proposition that an employment seniority system which provides that the last hired will be the first fired, even where such a system perpetuates past discrimination, does not violate Title VIII. (Appellees Brief, pp. 11, 26). None of these cases, however, and none of the discussion in the brief submitted by appellees, squarely deals with the issue of the perpetuation of past discrimination which, as here, was unlawful at the time it occurred.

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[1] It should be noted that this case involves discrimination based upon sex, not discrimination based upon race as appellees suggest in their brief (Appellees' Brief, p. 11).

Waters dealt with the perpetuation of discriminatory hiring practices occurring prior to 1964 and, therefore, prior to the effective date of Title VII:

> "We believe the record supports the conclusion that Wisconsin Steel engaged in racially discriminatory hiring policies with respect to the position of bricklayer prior to the enactment of Title VII." (502 F2d, at 1316). (emphasis added).

The prior discriminatory practices perpetuated by Wisconsin Steel by means of a facially neutral seniority system, therefore, were not unlawful at the time they occurred.[2]

Similarly, Watkins dealt with the perpetuation of pre-Title VII discrimination. This is clearly indicated by the court's framing of the major issue in that case:

> "First, given the fact that an employer discriminated in hiring, prior to but not after the effective date of the Civil Rights Act of 1964, does the use of employment seniority to determine the order of layoff of employees violate either Title VII or 42 U.S.C. §1981." (516 F.2d, at 43) (emphasis added).

The seniority system in Watkins, therefore, did not perpetuate prior practices which were unlawful at the time they occurred.

The situation in Jersey Central is more complex. It is not

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2 The indicated practices were not unlawful under 42 U.S.C. §1981 at the time they occurred as the provisions of the Civil Rights Act of 1866 were not deemed to prohibit discrimination in private employment until Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). See Appellants' Brief, p. 26 fn. 7.

clear whether the prior practices there were discriminatory, or, even assuming they were, that they occurred after the effective date of Title VII. In any event, it is clear that the Court in Jersey Central made no finding that such prior practices were in fact unlawful:

> "We recognize that the Company's affidavits contain statistics for the period 1966-1974 revealing a disproportion in the number of minority group and female employees. However, we decline to equate as a matter of law such a statistical showing with a per se violation of Title VII. (508 F2d, at 706 fn. 51).

Appellees state that:

> "The appellants argue that Waters, Jersey Central, and Watkins are distinguishable from the instant case because they did not deal 'explicitly with the perpetuation of discrimination.' (App. Br., p. 36)." (Appellees' Brief, pp. 25-26).

This is not a correct statement of appellants' position. Appellees have misquoted appellants' brief by omitting the significant word "unlawful." The quotation to which appellees refer reads as follows: "...neither Waters, Jersey Central, or Watkins dealt explicitly with the perpetuation of unlawful discrimination." (Appellants' Brief, p. 36).

The cited omission is critical for our purposes. For the present case is distinguishable from the cases cited by appellees since the prior hiring practices perpetuated by the application of §80 here were unlawful at the time they occurred. The practices, outlined in Appellants' Brief, pp. 12-15, were in violation of 42 U.S.C. §1983 and the Equal Protection Clause of the Fourteenth Amendement to

the United States Constitution at the time they occurred.[3] Therefore, the current application of §80 is not exempted by §2000e-2(h) of Title VII. A seniority system that perpetuates past unlawful discrimination is not "bona fide" and therefore not a seniority system whose effects are safeguarded by §2000e-2(h).

The legislative history cited by appellees confirms the validity of this distinction. The interpretative memorandum received by Senator Clark from the United States Department of Justice concerning Title VII, cited at Appellees' Brief, pp. 13-14, noted that:

> "Title VII would have no effect on seniority rights existing at the time it takes effect... This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes." (110 Cong. Rec. 7207) (emphasis added).

The theory underlining this memorandum is that prior lawful practices, even if discriminatory, could be perpetuated by means of a facially neutral seniority system.[4]

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3 Appellees state that it is undisputed that the Police Department has pursued non-discriminatory hiring policies since 1973. (Appellees' Brief, pp. 2, 23, 25). This is not true. Appellants have alleged a continuing pattern of discrimination based upon sex after January 1973 in that a four-to-one appointment ratio was used in appointing men and women to the position of Police Officer. (Appellants' Brief, p. 15).

4 Appellants do not claim that this memorandum is an accurate expression of legislative intent. The legislative history cited by appellees has already been criticized in Appellants' Brief, pp. 34-36, and that criticism need not be repeated here. Appellants are here contending that even assuming arguendo that this and other memoranda cited by appellees are accurate expressions of the legislative intent in passing Title VII, they do not undermine appellants' argument that §2000e-2(h) does not exempt seniority systems which perpetuate prior unlawful discrimination.

Appellants' argument does not, as appellees suggest, render §2000e-2(h) meaningless. (Appellees' Brief, p. 24). At most this section may be read to exempt seniority systems which perpetuate prior discriminatory practices which were not unlawful at the time they occurred. At a minimum, it exempts a facially neutral seniority system which perpetuates an imbalance in the work force which was not created through discriminatory practices. In either of these events, §200e-2(h) serves a useful purpose; the utility of the section does not require it to exculpate by perpetuating prior unlawful discrimination.

Appellees state that: "Appellants have not cited any decision by a Court of Appelas which holds that a neutral seniority system violates Title VII." (Appellees' Brief, p. 17).[5] This is not accurate. Appellants cited Afro-American Patrolmen's League v. Duck, 503 F.2d 294 (6th Cir. 1974) (Appellants' Brief, p. 40), which held that a promotion system in the Toledo Police Department which combined a racially neutral and job-related written test with a requirement of five years of service violated 42 U.S.C. §1981 and §1983 as well as the Equal Protection Clause of the Fourteenth Amendment, where a racial imbalance was found to have existed in the police force as a result of prior discriminatory hiring practices.

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5 Presumably appellees are referring to cases holding a "plant-wide" seniority system not to be in violation of Title VII. Appellees do not dispute that departmental seniority systems have been struck down uniformly when they have the effect of perpetuating prior discrimination. Appellees' Brief, pp. 17-19

Appellants also cited Allen v. City of Mobile, 331 F. Supp. 1134 (S.D. Ala 1971), aff'd per curiam 466 F. 2d 122 (5th Cir. 1972), cert. denied 412 U.S. 909 (1973) (Appellants' Brief, pp. 40-41), which invalidated a police department seniority system under Title VII and 42 U.S.C. 1981 and 1983 where no blacks had been on the force long enough to earn the maximum number of seniority points. Similarly, we noted Meadows v. Ford Motor Co., 510 F. 2d 939 (6th Cir. 1975)(Appellants' Brief, p. 32), where it was found that Ford Motor Co. had employed a 150 lb. limitation on production line hires, and that this policy discriminated against women in violation of Title VII and, in the face of these unlawful hiring practices, the case was remanded to the District Court to determine inter alia, the desirability of granting plaintiffs retroactive seniority. The Court expressly noted that such a remedy is possible pursuant to Title VII.

In view of the criticality assigned by the appellees to the holdings in other Circuits on the effect of §2000e-2(h) on prior discrimination, it may be helpful to consider Jurinko v. Edwin L. Wiegand Company, 477 F. 2d 1038 (3rd Cir. 1973), vacated and remanded on other grounds 414 U.S. 970 (1973). In Jurinko the Wiegand Company was found to have discriminatorily refused employment to plaintiffs in violation of Title VII. The District Court awarded plaintiffs back pay and attorney fees and directed Wiegand to offer employment to plaintiffs (477 F. 2d, at 1040-1041), but did not grant retroactive seniority to plaintiffs. The Court of Appeals for the Third Circuit,

however, because of the prior unlawful discriminatory hiring practices, directed that the relief ordered be expanded to include seniority from the date of the refusal to hire plaintiffs:

> "We can perceive no basis for the trial court to have refused to award back seniority or for its conclusion that 'the plaintiffs are to be offered employment in production with the Company, of course, as new employees.' Seniority is, of course, of great importance to production [illegible]s for it determines both opportunities for [illegible]dvancement and the order of layoff in the case of a reduction in a company's operating forces. It is our view that the plaintiffs are entitled to seniority and back pay dating from the time of the discriminatory hiring practice up to the time they are actually reinstated. Only in this way, will the present effects of the past discrimination be eliminated." (477 F. 2d, at 1046)

Appellees do not dispute that the application of §80 to appellants and those similarily situated has had a disparate impact upon female police officers. (Appellees' Brief, p. 23). They suggest, however, that rather than grant the relief sought by appellants, courts can deal with such disparity by means of preferential treatment in hiring quotas and promotions. (Appellees' Brief, p. 24). Even apart from the issue of the validity of such preferential treatment by reason of §2000e-2(j) of Title VII and the many cases cited by appellees indicating a reluctance to impose hiring quotas (Appellees' Brief, p. 24), it is frivolous to suggest promotional opportunities as a solution for women who have been laid-off. It is equally futile to suggest new hiring quotas as a solution when reinstatement is to be determined by §81 of the Civil Service Law which will

perpetuate prior discriminatory practices as to appellants in the same manner as does §80.

Appellees also fail to note that appellants allege and are prepared to prove that they are the actual victims of prior discrimination (Appendix pp. 101a-103a, 109a-111a). Therefore, the danger present in Watkins,--i.e., that complainants might receive a windfall in that they would be better off if granted retroactive seniority than they would have been had no prior discriminatory hiring practices occurred,--is not present here. There is here, therefore, lacking the windfall risk which apparently induced various of the holdings relied upon by appellees. (See Appellants' Brief, pp. 32-34).

Appellees have, we believe, relied on Circuit rulings which are inapposite or distinguishable for the reasons indicated. On the other hand, appellees have referred to Franks V. Bowman Transportation Co., 495 F. 2d 398 (5th Cir. 1974), cert. granted 43 U.S.L.W. 3510 (1975), in a highly confusing manner (see Appellees' Brief, p. 19) and we feel obliged to discuss Franks since it deals with the perpetuation of prior unlawful discrimination against an identifiable victim of such prior discrimination. Franks denied relief by way of back seniority in the described circumstances, and therefore seems squarely in conflict with the language of that same Fifth Circuit in Watkins (quoted at Appellants' Brief, p. 33) which would leave open the entitlement to retroactive seniority for the identifiable victim of post-Title VII discrimination. Franks has been argued before

the Supreme Court and a decision is pending.[6]

It should be noted that granting retroactive seniority under Title VII is not a particularly novel development. Such relief pursuant to the NLRA has been granted under 29 U.S.C. §160(c). This provision is worded as broadly as is 42 U.S.C. §2000e-5(g).[7] In fact, the legislative history of Title VII suggests that Congress intended §2000e-5(g) to confer authority similar to that of 29 U.S.C. §160(c).[8] The accepted implementation of this latter section is exemplified by the decisions of the NLRB in Nevada Consolidated Copper Corp., 26 N.L.R.B. 1182, 7 LRRM 33 (1940), enforcement denied 122 F. 2d 587 (10th Cir. 1941), enforced 316 U.S. 105 (1942); and Hughes Corporation, 135 N.L.R.B. 1222, 49 LRRM 1680 (1962). In Nevada Consolidated Copper Corp., an employer, who had ceased operations, was found to have discriminated in re-hiring its former employees on the basis of union affiliation. The Board held that:

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6 At the oral argument before the Supreme Court on November 3, 1975, neither party contraverted the proposition that the identifiable victim of past unlawful discrimination could receive under Title VII retroactive seniority back to the date of such discrimination.

7 29 U.S.C. §160(c) reads: "...If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and caused to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

8 110 Cong. Rec. 6549 (1964) (remarks of Senator Humphrey); H.R. Rep. No. 914, 88th Cong. 1st Sess. (1963) 112.

> "[The] employer is ordered to offer immediate employment to 24 named persons at same or substantially equivalent positions which they would have secured, including seniority or other rights or privileges they would have acquired, had employer not unlawfully discriminated against them by refusing to hire them..." (26 N.L.R.B., at 1231; 7 LRRM, at 39)

In Hughes Corporation the Board found that the employer had refused to hire the complainant because he had no union referral. The Board concluded that:

> "Since the applicant was discriminatorily denied employment on May 1, before any other employee was hired on that date, the applicant must, if the employer still has need of the services of journeymen sheet metal workers on the project, be offered immediate employment as a journeyman sheet metal worker on that project, without prejudice to such seniority or other rights and privileges as he would have enjoyed had he been hired on May 1, 1961, discharging, if necessary, any journeyman sheet metal worker hired on that project on or after May 1, 1971." (135 N.L.R.B.,at 1223; 49 LRRM, at 1681.)

II.

APPELLEES' BRIEF HAS ALSO FAILED TO MEET APPELLANTS' ARGUMENT THAT §80, CIVIL SERVICE LAW, AS HERE APPLIED VIOLATES §1983 AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Apart from their status under Title VII, the actions complained of violate 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution. Appellants' right to relief under these provisions is completely independent of Title VII. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Johnson v. Railway Express Agency, Inc., 95 S.Ct. 1716 (1975). Therefore, §2000e-2(h), even if a barrier to relief under Title VII, does not preclude relief under these provisions. (Appellants' Brief, p. 42).

By way of response appellees cite Howard v. Lockheed Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974), for the proposition that compensatory and punitive damages, in addition to back pay, are not available under 42 U.S.C. §1981 on the grounds that they are not available under Title VII. (Appellees' Brief, p. 28). The conclusion to be drawn, presumably, is that Title VII limitations are to be read into a statute passed nearly a century before its enactment. Howard, however, has been expressly overruled by the United States Supreme Court in Johnson v. Railway Express Agency Inc., supra. In Johnson, the Court noted that:

> "Some district courts have ruled that neither compensatory nor punitive damages may be awarded in the Title VII suit." (citing Howard) (95 S.Ct., at 1719)

The Court subsequently rejected this position, noting that:

> "An individual who establishes a cause of action under §1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages. (95 S.Ct., at 1720)

Appellees also cite Stamps v. Detroit Edison, 515 F. 2d 301 (6th Cir. 1975), for the proposition that punitive damages are not possible under §1981 on the grounds that they are not authorized under Title VII. (Appellees' Brief, p. 29). To the extent that Stamps so holds, it is inconsistent with the Supreme Court's holding in Johnson and therefore likewise overruled.

Appellees state that:

> "Moreover the Courts of Appeal in Waters and Watkins specifically found that the use of a seniority system did not violate under [sic] 1983." (Appellees' Brief, p. 27.)

Neither court mentioned §1983 in their opinions. Both courts did, however, deal with the status of seniority systems under 42 U.S.C. §1981. In Watkins, however, the Fifth Circuit expressly noted the independent efficacy of §1981, but found no violation under this section on the grounds that the plaintiffs were not the actual victims of prior discriminatory practices. (516 F. 2d, at 49-50.) Waters, to the extent that it conditions relief under §1981 upon the availability of relief under Title VII, is in conflict with the legislative history of Title VII noted in Alexander, supra. The Supreme Court in Alexander quoted from an interpretative memo of Senator Clark which stated that:

> "Title VII is not intended to and does not deny to any individual rights and remedies which he may pursue under other Federal and State

> statutes." [110 Cong. Rec. 7203 (1964), quoted at 415 U.S., at 48 fn. 9.]

The Court also noted in Alexander that in 1964 the Senate rejected an amendment which would have made Title VII the exclusive federal remedy for most unlawful employment practices [110 Cong. Rec. 13650-13652 (1964)], and that a similar amendment was rejected in 1972 [H.R. 9247, 92d Cong. 1st Sess. (1971); H.R. Rep. No. 92-238 (1971), 2 U.S. Code Cong. and Admin. News, 92d Cong. 2d Sess. 2137, 2179, 2181-2182 (1972)] (see 415 U.S., at 48 fn. 9). Finally, the Court cited the Senate Report which stated that neither:

> "...provisions regarding the individuals' right to sue under Title VII, nor any of the other provisions of this bill, are meant to affect existing rights granted under other laws." [S. Rep. No. 92-415, p. 24 (1971); 415 U.S., at 68 fn. 9.]

Waters and Watkins dealt with the interaction of Title VII and §1981. Whatever justification may remain after Alexander and Johnson to read Title VII limitations, -- such as exempting the effects of a bona fide seniority system, -- into §1981 suits, such limitations should not be imported into §1983 actions. Unlike §1981, §1983 refers explicitly to the deprivation of constitutional rights. The deprivation of such rights is of a special order of magnitude; courts should not be limited in action brought under this section to remedies available for the redress of specific statutory violations, and rights cognizable under this section should certainly not be limited to those which may be redressed under other statutes. Title VII did not repeal the Constitution.

Public not private employers are the object of §1983 employment discrimination suits. Seniority systems in the public sector are typically the product of a unilateral, political process, particularly in view of the relatively recent development of collective bargaining in public employment. Seniority systems thus established, rather than collectively bargained as they frequently are in private employment, obviously raise substantial considerations significantly different from those implicated by the seniority systems which were the object of concern in Title VII. And it is particularly inappropriate now to carry over wholesale to §1983 the effect of §2000e-2(h) when the latter was adopted in the context of newly-proscribed discrimination in private employment so as not to penalize earlier not unlawful discrimination and the former deals with discrimination unlawful for more than 100 years starting with the Fourteenth Amendment.

Conclusion

The orders and judgment of the Court below should be reversed, and judgment entered in favor of the plaintiffs directing their reinstatement and/or other appropriate relief, including but not limited to back-pay, costs, and reasonable attorneys' fees. In the alternative, the judgment of dismissal in the Court below should be reversed and remanded with leave to amend.

Respectfully submitted,

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* We acknowledge the assistance of Kenneth E. Gordon who is not yet admitted tc practice.